

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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In the Matter of)
 Replacement of Part 90 by)
 Part 88 to Revise the Private)
 Land Mobile Radio Services)
 and Modify the Policies)
 Governing Them)
 and)
 Examination of Exclusivity)
 and Frequency Assignment)
 Policies of the Private)
 Land Mobile Radio Services)

FEDERAL

PR Docket No. 92-235

TO: The Commission

**REPLY COMMENTS OF
INTERNATIONAL TAXICAB AND LIVERY ASSOCIATION**

International Taxicab and Livery Association ("ITLA"), by its counsel, hereby submits its comments in reply with respect to the Further Notice of Proposed Rulemaking (the "Further Notice"; FCC 95-255, released June 23, 1995) in this proceeding.

BACKGROUND

In its opening comments ITLA expressed support for the proposition that, except in major metropolitan areas, users should be allowed to determine whether and when to convert to narrowband or equivalent equipment. ITLA went on to support exclusivity but urged that such status be achievable based upon any one of several factors such as special operational or safety needs, or attainment

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of certain loading levels (along with agreement of co-channel licensees).

ITLA strongly opposed auctions and user fees: auctions are ill-suited for use in this heavily encumbered part of the spectrum; user fees amount to a new form of taxation and should be rejected out-of-hand except possibly as the price for the allocation of additional PLMRS spectrum and then confined to licenses for the new spectrum.

Finally, ITLA urged that licensees converting to new technology be able to retain the new channel created by their investment.

DISCUSSION

The opening comments offered support for most, if not all, of these positions. For example, Motorola urged that it would be "most fair" to require narrowband conversion only of users in "frequency deficient areas or, alternatively, in the top markets...." Id. at n. 8. Likewise Nippon Telegraph and Telephone Company urged that users converting to narrowband be able to capture the value of the new channels they create. Id. at 4-6. Numerous parties opposed resale.

ITLA offers these comments in reply to certain issues raised in the opening comments.

Mandatory Conversion

Land Mobile Communications Council ("LMCC") suggests that conversion to narrowband or equivalently efficient technology should be mandatory "for all markets designated as frequency-

congested by the frequency advisory committees..." with secondary status (i.e. interference) being the price for non-conversion. Comments at 14.

While ITLA does not disagree that conversion be mandatory in "frequency-congested" markets, ITLA is not comfortable with the notion that designation of such markets be left entirely up to the frequency coordination community.

First. A threshold legal issue is presented as to whether the Commission has the authority to delegate such a determination to outside entities. The Administrative Procedure Act, 5 U.S.C. Section 553, requires regulatory agencies to afford interested parties notice and an opportunity to comment before adopting a substantive rule. See American Ambulance Serv. v. Sullivan, 911 F.2d 901, 907 (3d Cir. 1990) (substantive rules are those which "grant rights, impose obligations, or produce other significant effects on private interests"). Certainly a choice as to which groups of existing licensees will be required to purchase new equipment, on pain of being deprived of the protected, primary status for which they were originally licensed, is a substantive rule. Such a rule should be adopted by the Commission itself after proper notice and opportunity for comment. See also 47 U.S.C. Section 316. Indeed, where, as here, the Commission has issued a decision which disavows mandatory conversion, see Report and Order in PR Docket No. 92-235, FCC 95-255, released June 23, 1995 at para. 7, it is all the more important that the public be given adequate notice.

UTC suggests that areas within 100 miles of the top 60 urban areas, be subject to mandatory conversion. Id. at 28. Such a classification sweeps too broadly: there is no showing, much less data, to indicate that spectrum congestion is a problem in the many rural areas that would be encompassed by the proposal. Rather, ITLA urges that the top-20 metropolitan areas (and a 75-mile radius from each such area) represents a reasonable balance for the need to provide spectrum relief versus avoiding unnecessary burdens on licensees.

Exclusivity

American Petroleum Institute ("API") suggests that exclusivity agreements should only be accommodated "between similar energy industry users." Id. at 8. If consolidation is required, it would be a contradiction in terms to restrict exclusivity within a pool to eligibles from the same, superceded Radio Service. This is especially the case given the fact that the Petroleum Radio Service shares frequencies with a number of other services. API's proposal, if adopted generally, would make it more difficult for users in one Service to strike exclusivity agreements with users in another Service even if those other users were on the same channel in the same area.

Resale

UTC argues that for-profit resale should be allowed. Id. at 18-19; see also Ericsson at 5. While UTC would confine resale to licensees meeting loading requirements based on their internal needs (not the needs of a third party), and while UTC would confine resale to eligibles in the licensee's own pool, its proposal is fraught with problems. The Commission has neither the resources nor the time to verify the bona fides of such agreements. It would be all too easy for a commercial provider in the Business Radio Service to establish its "eligibility" for resale in its pool; once this is done, it could effectively remove the frequency in question from the private radio inventory.

Moreover, resale would inevitably lead to the intermixture of private and commercial systems. This, in turn, could raise questions about the regulatory classification of a particular licensee as CMRS or PMRS, and whether such frequencies should be auctioned.

Nor are ITLA's concerns merely academic. American Mobile Telecommunications Association, Inc. ("AMTA"), for its part, refers to the Commission "provid[ing] prospective commercial providers with adequate regulatory tools to clear sufficient spectrum in a reasonable timeframe." Id. at iii, 6, 9. AMTA does not suggest what those "tools" might be, but it makes perfectly clear that it envisions re-creating an 800 and 900 MHz scenario in bands historically reserved for the internal needs of American business and industry. However, for the reasons discussed in detail in

ITLA's opening Comments at 10 note 5, AMTA's homogenized, carrier solution for these specialized needs will not do.

User Fees

UTC and Motorola indicate support for user fees. UTC at 26; Motorola at 3. While it is unlikely that the Commission will be authorized to employ user fees anytime soon, even still there is no merit to the notion that user fees be imposed on existing licensees. These users already pay application fees and regulatory fees. Imposition of a new tax on the public is contrary to the effort to reduce -- not increase -- the federal government's share of the gross domestic product.

Furthermore, any user fees high enough to induce more efficient spectrum use would be just as likely to induce would-be users to dispense with licensing altogether. In other words, user fees are likely to be self-defeating.

Most assuredly there is no reason for entertaining UTC's proposal that oil companies, utilities, and railroads -- among the largest, most heavily capitalized industries in the United States -- be exempt from user fees. Id. at 26. What sort of equity is there in the notion that an Exxon, for example, should be exempt, while a local taxicab company should not be?

Disposition Of New Channels

Association of Public-Safety Communications Officials-International, Inc. ("APCO") argues that new channels created by narrowband conversion should be allocated for public safety. Id. at 7. ITLA can understand, if not support, the plea that public safety agencies should not be liable for user fees. However, it goes beyond the pale for APCO to attempt to appropriate channels created by private investment for the use of government agencies. If APCO needs new channels, it should get those channels the same way everyone else does -- not attempt to have businesses large and small across the United States subsidize new channels for them.

Consolidation

Various proposals have been advanced on the subject of consolidation. These include the ITA/PCIA two-pool approach, the UTC three-pool approach, and API's five-pool approach, each of which is addressed in the Reply Comments of the Coalition of Industrial and Land Transportation Radio Users ("the Coalition") of which ITLA is a member.

ITLA continues to urge adoption of the Coalition's four-pool proposal which alone among the various consolidation plans appropriately balances the benefits from pooling similar types of users with the efficiency gains espoused by the Commission. If consolidation should ultimately be required (a determination which ITLA and many others have opposed), ITLA would urge adoption of the

Coalition's plan. ITLA offers one additional comment on the subject of consolidation.

UTC argues in its comments for three pools: Emergency Response; Public Service; and Business/Commercial. Emergency Response would include Police, Fire and the like. Public Service would be comprised of Power, Petroleum, Railroad, Highway Maintenance, Forestry Conservation, and Local Government. Business/Commercial would consist of all other Radio Services. According to UTC, its plan is justified by "criticality of function" (id. at 4); UTC goes on to assert that its Public Service pool is designed to include categories of users "that provide essential public services in compliance with Federal and State or local requirements." Id. at 7.

It is a measure of the arbitrary and subjective nature of UTC's "Public Service" category that it has seen fit to leave out several Radio Services whose licensees provide essential public utility services. These include the Motor Carrier Radio Service (which includes virtually all municipal bus systems); the Taxicab Radio Service (whose licensees are franchised by municipal, county and airport authorities); and the Telephone Maintenance Radio Service (whose licensees are certificated to provide, for example, local exchange telephone services).^{1/} Many of these entities are

^{1/} Indicative of the public service character to the taxi industry is the fact that taxi fleets in the United States transport almost 2 billion passengers annually -- nearly 20 percent of all public transit service. Much of this service is provided to the elderly, the poor and the disabled; these are persons for whom there is often no other means of transportation for trips to the
(continued...)

required by law and/or the terms of their franchises to operate radio systems as essential to the public interest in safe, efficient provision of service.^{2/} In short for the reasons stated by the Coalition and here, UTC's proposal should be rejected.

CONCLUSION

As discussed in its opening Comments and in this Reply, the Commission should resolve the issues in the Further Notice along the lines suggested by ITLA.

Respectfully submitted,

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^{1/}(...continued)

doctor, hospital or clinic (other than ambulance). For more details see ITLA's opening comments at 2-6.

^{2/} Radio is particularly important to safety in the taxi industry: taxi drivers suffer by far the highest homicide rate of any occupation according to U.S. government statistics. See ITLA Comments at 4.